Bumiputra (M) Finance Ltd v Datuk Syed Kechik bin Syed Mohamed & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO C 23–1988–86
MAHADEV SHANKAR J
13 SEPTEMBER 1988

Exchange Control *— Claim for recovery of debt — Foreign plaintiff — Payment subject to permission of controller of foreign exchange — Whether defendants 'borrower' — Exchange Control Act 1953 ss 4, 36, Fourth Schedule art 4*

The plaintiff, Bumiputra (M) Finance Bhd was incorporated in Hong Kong. Sri Hartamas Investment (HK) Ltd ('the borrower') was also incorporated in Hong Kong. Both had their registered offices in Hong Kong. The borrower applied to the plaintiff for a loan of US$40m ('the loan'). All the defendants were directors of the borrower. The loan agreement also required a guarantee ('the guarantee') to be given by them. Even though the addresses of each of the defendants in the loan agreement were their Kuala Lumpur addresses, in the guarantee, their address was given as Room 1501, Hutchison House, Harcourt Road, Hong Kong. The borrower defaulted and the plaintiff sued after all reassurance by the borrower that positive steps were being taken to repay the moneys due had been proven to be worthless. The defendant contended that because the guarantee was executed by the first four defendants in Malaysia, 'it involved ... or was preparatory to ... borrowing ... foreign currency from ... a person outside Malaysia.' Since this was done without the permission of the controller of foreign exchange it was argued that the guarantee was given in contravention of s 4 of the Exchange Control Act 1953 ('the Act') and consequently that it was void for illegality.

Held:

(1) Section 4 of the Act has no application to the facts of this case. The borrower in this case was not a Malaysian resident. As for the defendants, even if it be assumed that for the purposes of the Act all of them were resident in Malaysia, none of them borrowed the loan or any part thereof in Malaysia. Nor did any of them do any act which involved the borrowing of any part of the loan because they were not the borrowers. A guarantor is not a borrower, he provides collateral security and thereby incurs a contingent liability even if for purposes of suit he is to be treated as a principal debtor. The defendants were not the actual recipients of the loan. In any case, it is clear that the entire contract was negotiated in Hong Kong. The solitary act of signing it in Malaysia does not make it a 'Malaysian' borrowing (see pp 759C, 762D).

(2) Section 4 of the Act does not make the act of borrowing illegal. By providing that such borrowing shall not be done with the permission of the controller, the illegality in question is encompassed in the omission to obtain the controller's

permission. The Act does not by its scheme make the guarantee illegal and unenforceable. Indeed it is saved from such a contention by the express words of s 36 and art 4 of the Fourth Schedule of the Act (see pp 759E, 762E). A

[Bahasa Malaysia summary B

Plaintif, Bumiputra (M) Finance Bhd telah ditubuhkan di Hong Kong. Sri Hartamas Investment (HK) Ltd ('peminjam') juga telah ditubuhkan di Hong Kong. Kedua-duanya mempunyai pejabat berdaftar di Hong Kong. Peminjam telah memohon kepada plaintif untuk satu pinjaman US$40j ('pinjaman tersebut'). Kesemua C defendan-defendan adalah pengarah kepada peminjam. Perjanjian pinjaman tersebut juga menghendaki satu jaminan ('jaminan tersebut') yang akan diberikan kepada mereka. Walaupun alamat-alamat setiap defendan di dalam perjanjian pinjaman tersebut adalah alamat-alamat mereka di Kuala Lumpur, di dalam jaminan tersebut, alamat mereka diberikan sebagai Bilik 1501, Hutchison House, D Harcourt Road, Hong Kong. Peminjam telah gagal dalam pembayaran dan plaintif telah menyaman setelah semua kata-kata penenteraman oleh peminjam bahawa langkah-langkah positif telah diambil untuk membayar balik wang yang perlu dibayar telah terbukti tidak berhasil. Defendan menegaskan bahawa disebabkan jaminan tersebut telah disempurnakan oleh empat defendan-defendan yang E pertama di Malaysia, 'ia melibatkan ... atau telah bersedia untuk ... meminjam ... pertukaran wang asing daripada ... seseorang luar Malaysia.' Memandangkan ini telah dilakukan tanpa kebenaran pengawal pertukaran wang asing ia dihujhkan bahawa jaminan tersebut telah diberikan bertentangan dengan s 4 Akta Pertukaran F Kawalan Wang 1953 ('Akta tersebut') dan justeru itu ia adalah tidak sah kerana salah di sisi undang-undang.

Diputuskan:

(1) Seksyen 4 Akta tersebut tiada terpakai kepada fakta-fakta dalam G kes ini. Peminjam dalam kes ini bukan pemastautin Malaysia. Defendan-defendan pula, walapun dengan andaian bahawa bagi tujuan Akta tersebut semuanya adalah pemastautin Malaysia, tiada seorangpun daripada mereka yang membuat pinjaman atau apa-apa bahagian di Malaysia. Maupun mana-mana daripada mereka telah membuat apa-apa tindakan yang melibatkan H peminjaman apa-apa bahagian pinjaman tersebut kerana mereka bukanlah peminjam. Seorang penjamin bukan seorang peminjam, beliau memberikan jaminan kolateral dan oleh itu melibatkan liabiliti secara kebetulan walaupun bagi tujuan guaman beliau dianggap sebagai penghutang prinsipal. Defendan-defendan bukan penerima sebenar pinjaman tersebut. Dalam apa I keadaanpun adalah jelas bahawa keseluruhan kontrak tersebut telah dirundingkan di Hong Kong. Satu-satunya tindakan

menandatanganinya di Malaysia tidak menjadikannya satu pinjaman 'Malaysia' (lihat ms 759C, 762D).

(2) Seksyen 4 Akta tersebut tidak menjadikan tindakan pinjaman tersebut tidak sah. Dengan memperuntukkan bahawa pinjaman sedemikian tidak sepatutnya dibuat dengan kebenaran pengawal, ketidaksahihan yang dipersoalkan terkandung dalam peninggalan untuk mendapat kebenaran pengawal. Akta tersebut tidak melalui skimanya menjadikan jaminan tersebut tidak sah dan tidak boelh dikuatkuasakan. Sememangnya ia telah selamat daripada perbalahan sedemikian melaui perkataan-perkataan yang dinyatakan dalam s 36 dan perkara 4 Jadual Keempat Akta tersebut (lihat ms 759E, 762E).]

Notes

For cases on exchange control generally, see 10 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2532–2547.

Cases referred to

Bank of India v Trans Continental Commodity Merchants Ltd & Anor [1986] 2 MLJ 342 (refd)
Bauche Drake v Woodhouse Drake [1982] 2 Lloyd's Rep 516 (refd)
Boissevain v Weil [1950] AC 327 (refd)
Contract and Trading Co (Southern) Ltd v Barbey [1960] AC 244 (refd)
Koh Kim Chai v Asia Commercial Banking Corp Ltd [1984] 1 MLJ 322 (refd)
R v Aik Hoe & Co Ltd [1958] MLJ 59 (refd)
Shelley v Paddock [1980] 1 All ER 1009 (refd)

Legislation referred to

Defence (Finance) Regulations 1939 (UK)
Exchange Control Act 1953 ss 4, (2), 9, 36 Fourth Schedule art 4, (1)
Exchange Control Act 1947 (UK) s 33(1)

Steven Quah (Robert Choong with him*) (Alber, Zulkifly & Yap)* for the plaintiff.

Wong Soon Foh (Miss Yap with him*) (Chooi & Co)* for the defendant.

Mahadev Shankar J: This is an application for final judgment.

The plaintiff, Bumiputra (M) Finance Bhd is incorporated in Hong Kong. Sri Hartamas Investment (HK) Ltd (the borrower) is also incorporated in Hong Kong. Both have their registered offices in Hong Kong.

In early 1982, the borrower had two wholly owned subsidiaries in the United States. These two subsidiaries were then in the course of purchasing two private companies in California, which between them had a contract to buy about 2,000 acres of land in California.

To finance this transaction, the borrower applied to the plaintiff for a loan of US$40 million ('the loan'). The plaintiff agreed. This transaction is reflected in a formal written loan agreement ('the loan agreement') executed in Hong Kong on 6 March 1982. US$5 million had already been advanced on 20 January 1982. The balance was paid over in specified instalments by 20 January 1983 in US dollars.

Part of the terms and conditions of the loan were that Sri Hartamas Development Sdn Bhd, a company incorporated in Malaysia, do give a first legal mortgage over 180 acres of land it owned in Kuala Lumpur to Bank Bumiputra Malaysia Bhd.

All the defendants were directors of the borrower. The loan agreement also required a guarantee ('the guarantee') to be given by them.

The guarantee is dated 8 March 1982. Even though the addresses of each of the defendants in the loan agreement are their Kuala Lumpur addresses, in the guarantee, their address is given as Room 1501, Hutchison House, Harcourt Road, Hong Kong. The guarantee carries the signature of each of the defendants and their seals. The signature of WH Chong, the fifth defendant was attested by a Hong Kong solicitor. The signatures of the other four are notarially certified on 8 March 1982 by Dato' T Tharumagnanam to be the true signatures of the gentlemen concerned.

Upon the borrower's default, the plaintiff demanded payment by letter dated 22 April 1986. The defendants replied by telex that they would settle the matter and asked for time. This admission was clear and unequivocal. Indeed, on 26 June 1986, a further letter was sent by the defendants to reassure the plaintiff that positive steps were being taken to repay the moneys due.

These promises and assurances have since been proven to be worthless. So the plaintiff sued. Because the guarantee was executed by the first four defendants in Malaysia, all the defendants said that 'it involved ... or was preparatory to ... borrowing ... foreign currency from ... a person outside Malaysia.' Since this was done without the permission of the controller of foreign exchange it is argued that the guarantee was given in contravention of section 4 of the Exchange Control Act 1953 ('the Act') and consequently that it was void for illegality. To echo the words of Parker J in *Bauche Drake v Woodhouse Drake* [1982] 2 Lloyd's Rep 516 at p 527, this was a defence that was devoid of merit but if it is in law a good claim, the first four defendants and possibly the fifth defendant, are well entitled to rely upon it.

The material portions of section 4 of the Act read as follows:

(1) Except with the permission of the controller, no person ... shall, in Malaysia, ... borrow any ... foreign currency from ... any person other than an authorized dealer.

(2) Except with the permission of the controller, no person resident (in Malaysia) ... shall, in Malaysia, do any act ... preparatory to ... borrowing any ... foreign currency from ... any person outside Malaysia.

A (3) Where a person ... borrows any foreign currency in Malaysia, or being a person resident (in Malaysia) does any act preparatory to ... borrowing ... foreign currency outside Malaysia ... he shall comply with such conditions as ... may ... be notified to him by the controller.

By the first schedule to the Act, the expression 'the scheduled territories' B mean 'Malaysia' and I have for case of reference transposed this into the brackets above.

Straightaway it should become apparent and I so hold that s 4 of the Act has no application to the facts of this case. The borrower in this case was not a Malaysian resident. As for the defendants, even if it be assumed that C for the purposes of the Act all of them were resident in Malaysia, none of them borrowed the loan or any part thereof in Malaysia. Nor in my view did any of them do any act which involved the borrowing of any part of the loan because they were not the borrowers.

I have derived some assistance for the formation of this view from *Koh* D *Kim Chai v Asia Commercial Banking Corp Ltd* [1984] 1 MLJ 322 at p 323. Bearing in mind that Koh Kim Chai was a Malaysian resident and he had charged his land to the bank aforesaid to secure loans made to a Singaporean company, the Privy Council held that they did not consider the expression 'making advance to customers' was capable of including the taking of security from third parties.

E The next point to note about s 4 is that it does not make the act of borrowing illegal. By providing that such borrowing shall not be done with the permission of the controller, the illegality in question is encompassed in the omission to obtain the controller's permission.

F In this context, s 36 of the Act is relevant. It reads in material particular as follows:

36 (1) It shall be an implied condition in any contract that, where by virtue of this Act, the permission or consent of the controller is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the permission or G consent is given or is not required:
Provided that this subsection shall not apply in so far as it is shown to be inconsistent with the intention of the parties that it should apply, whether by reason of their having contemplated the performance of that term in spite of this Act or for any other reason.

(2) Notwithstanding anything in the Bill of Exchange Act, 1964, neither the provisions of this Act, nor any conditions, whether express or to H be implied having regard to those provisions, that any payment shall not be made without the permission of the controller under this Act, shall be deemed to prevent any instrument being a bill of exchange or promissory note.

(3) The forth schedule shall have effect with respect to legal proceedings, arbitrations, bankruptcy proceedings, the I administration of the estates of deceased persons, the winding-up of companies, and proceedings under deeds of arrangement or trust deeds for behalf of creditors.

The fourth schedule clearly contemplates that legal proceedings may be brought in Malaysia by foreign creditors against local residents. In other words, Malaysian residents can, and in fact daily do incur commercial liabilities to persons abroad. In such cases, the effect of the provisions in this schedule is to ensure that judgments obtained are not satisfied by payments made from Malaysia to judgment creditors abroad without the permission of the controller first had and obtained. For the purposes of the present case it would suffice to set out the material words of art 4(1):

> ... in any proceedings in a prescribed court ... a claim for the recovery of any debt shall not be defeated by reason only of the debt not being payable without the permission of the controller and of that permission not having been given or having been revoked.

Indeed, the statutory form of the writ of summons in our courts takes specific cognizance of the requirements of the Exchange Control Act 1953 in regard to non-resident plaintiffs.

The only other section of the Act I need to refer to is s 9(1) which reads as follows:

> Except with the permission of the controller, no person shall, in Malaysia, do any act which involves, is in association with, or is preparatory to, the making of any payment outside Malaysia, to or for the credit of a person resident outside the schedule territories.

In this case, the defendants incurred a contingent liability as guarantors when they signed the guarantee. In all the circumstances of the case, I find as a fact that this liability was incurred in Hong Kong even if the defendants may have signed the document in Malaysia because everything points to the contract being negotiated in Hong Kong.

Counsel for the defendants relied very heavily on *Boissevain v Weil* [1950] AC 327. It should be manifestly obvious even on the most perfunctory consideration that this case is only authority for what it decides and consequently has no persuasive value whatsoever in Malaysia. The statute which the House of Lords was concerned was the old Defence (Finance) Regulations 1939 which had since been revoked. These regulations did not contain the saving provisions which were enacted in the English Exchange Control Act 1947 (upon which our act is modeled).

The draconian view which the Law Lords took of the legislation was necessitated by the fact that 'when the regulation first assumed its present amplitude the tide of war itself was beating blindly upon many innocent people.' (See Lord Radcliffe at p 344). Any common law principle it voices, has been considerably diluted by case law: See *Shelley v Paddock* [1980] 1 All ER 1009.

R v Aik Hoe & Co Ltd [1958] MLJ 59 was also cited to impugn the legality of the guarantee. The facts are again clearly distinguishable. The accused in that case did the prohibited act in Singapore viz sent cables from Singapore to bankers in New York to make payment of foreign currency to the credit of a party in Siam. Evidently the bankers in New York did so. There is no parallel here because the defendants have not yet paid

any money and evidently do not propose to do so until so ordered by this court.

In any event, there is no evidence before me to suggest that the plaintiff will attempt to take the amount of the judgment out of the country without the permission of the controller or that the parties envisaged when the guarantee was executed that if and when the time came for the guarantee to be honored in Malaysia, the defendants would do so without reference to the controller. In this context, the second limb of the decision of *Koh Kim Chai v Asia Commercial Banking Corp Ltd* [1984] 1 MLJ 322 is relevant. (See Lord Fraser's judgment at p 324).

The saving provisions of the English Exchange Control Act 1947 was the subject of *Contract and Trading Co (Southern) Ltd v Barbey* [1960] AC 244. The English s 33, and para 4(1) of sch IV of the English Act are almost identical to s 36 and art 4 of the fourth schedule to our Act. In that case, the English company had accepted liability on three Bills of Exchange for 8700 in favour of a Swiss partnership doing business in Geneva without the permission of the controller. The bills were dishonored on presentation. The Swiss sued in the English Courts. The same defence as the one in this case was taken. It failed because the court held that the express purpose of s 33(1) of the English Act was to protect the obligees of such contracts from being met with a defence by the obligors that a contract involving treasury consent for its performance was void in its inception for impossibility or illegality. (See Lord Radcliffe at p 255).

The test as to whether a contact is void for illegality is whether upon a true construction of the Act, Parliament had intended that the plaintiff should be precluded from enforcing the contract altogether. In such cases it will be necessary to consider whether the statutory requirement (in this case the consent of the controller) was an essential part of the cause of action or merely collateral to the contact and also whether the act contracted to be done was itself illegal or whether the illegality arose merely because some particular mode had been chosen to perform it which the statue had prohibited and for which the statue had provided a specific penalty.

JN Patel is a name not unknown to our courts. In *Bank of India v Trans Continental commodity Merchants Ltd and Anor* [1986] 2 MLJ 342 he was the second defendant. The first defendant (TCCM) was described as a creature of Patel to enable Patel to enter into forward foreign exchange contracts without overtly contravening the Malaysia Exchange Control Act. Patel agreed to provide a guarantee for TCCM's liabilities in London for TCCM's English contacts to purchase American dollars with Sterling and vice versa (see p 344). At p 345 Abdul Wahab Ghows J said:

> I have to reject Mr Selvadurai's argument that as Patel was himself liable under the forward exchange contracts because of the 'broad sweep' of his guarantee, the guarantee was in effect an exchange contract. It is clear from the authorities cited that the term 'exchange contracts' in s 2(b) of art VIII of the Bretton Woods Agreement should be interpreted narrowly and should be confined to contracts to exchange the currency of one country for that of another. It cannot include the guarantee signed by Patel — see *United City Merchants (Investments) Ltd v Royal Bank of Canada.*

Then Mr Selvadurai argued that the guarantee executed by Patel infringed the Malaysian Exchange Control Act because it was an act preparatory to buying or selling foreign currency to a person outside Malaysia and also because it was an act which involved or was preparatory to the making of a payment outside Malaysia without the permission of the controller. This argument presupposes that Patel intended to commit breaches of contract and had given the guarantee to the bank preparatory to making payment to it of damages for such breaches. I was of the opinion that this argument was so farfetched that it was not worthy of rational opposition.

To revert to the specific sections of our Act, the defendants themselves did not borrow any money at all. A Hong Kong company borrowed the money in Hong Kong. As for s 4(2), the defendants did not in Malaysia do any act involving or preparatory to borrowing money in Hong Kong. They were not the borrowers. A guarantor is not a borrower, he provides collateral security and thereby incurs a contingent liability even if for purposes of suit he is to be treated as a principal debtor. I so hold because the defendants were not the actual recipients of the loan. In any case it is clear that the entire contract was negotiated in Hong Kong. The solitary act of signing it in Malaysia does not make it a 'Malaysian' borrowing. As to the absence of the controller's permission at the time, the Act does not by its scheme make the guarantee illegal and unenforceable. Indeed it is saved from such a contention by the express words of s 36 and art 4 of the fourth schedule.

In passing, I do not think it irrelevant to observe that Bank Bumiputra Malaysia Bhd is an authorized dealer listed in the second schedule to the Act, I only need add that the first defendant did not file any affidavit to show cause why he should be given leave to defend. A contentious affidavit was filed by his counsel. This practice is unhealthy and must be stopped. If a lawyer wishes to give evidence for his client he should discharge himself from the case.

Nothing else of any significance has been raised in opposition to this claim and I therefore now give judgment to the plaintiff as prayed against all the defendant with costs, with liberty to apply.

Order accordingly.

Reported by Peter Ling

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